APPENDIX I.

I, George C. Myers, Clerk of the Supreme Court of the State of Mississippi do hereby certify that the following pages printed herein numbered..37...to..115.... contain a full true and correct copy of the briefs of counsel for both appellant and appellee in the cause of Rust Land & Lumber Company v. Ed Jackson et al, No. 17,835 upon the docket of this Supreme Court of the State of Mississippi and that the only omissions therefrom are quotations made from the authorities cited. That the complete arguments submitted in writing therein appear and that the originals thereof are upon file in my office.

Witness my signature this 31 day of October, 1918.

Signed: ..... Geo. C. Myers .....

Clerk Supreme Court

By M. J. Brown, D.C.

[L.S.]

IN THE

SUPREME COURT OF MISSISSIPPI

RUST LAND & LUMBER COMPANY

v.

ED JACKSON ET AL.

BRIEF FOR APPELLEES.

The questions involved necessarily requiring elaborate preparation, and the cause having been set peremptorily for October 16th, and no brief for appellant being now on file, (October 1) we herewith present the argument upon behalf of the appellees.

This suit comes from the Circuit Court of Coahoma County, wherein appellees brought replevin for certain cotton wood logs which they had severed from the land, of which the appellees claimed to be the owners, and of which logs appellees were deprived by force and fraud executed upon them (who were ignorant negroes) by the petty officials of Phillips County, Arkansas, at the instance of appellant. The merits of the controversy were fully submitted to a jury, and, as a result, a verdict rendered for appellees, whereunder all of the testimony introduced by appellant was substantially discredited as unworthy of credence. We submit:

POINT I.

The cause having been submitted to a jury, the judgment should be affirmed.

action of replevin. See, also, **May v. Rockett**, 25 Miss., 241.

Hence, appellees having had the actual possession, which actual possession was unlawfully invaded by appellant, the right to maintain replevin existed unless appellant could connect itself with the paramount title of one shown to be the lawful owner.

It appears that these sections in Arkansas were laid out in 1817, and contain only 68.70 acres; furthermore, a large island at that time existed **which was not platted as a part of the State of Arkansas.** Presumably, the thread of the stream threw this island into the State of Mississippi because not surveyed upon the west side of the river. The United States next surveyed the land in Mississippi, about 1833, when we have a definite location of the lots to which appellees claim title, and even upon the map made by appellant, a portion of the timber was cut from land which formed a part of Mississippi and which was surveyed in 1833 as a portion of Lot 1. These lots had their lines fixed; were located at that date and have been located in this case beyond a reasonable doubt, and having been so located upon the Mississippi river, we turn to the rights of riparian ownership incident thereto.

RIPARIAN RIGHTS IN MISSISSIPPI.

The local decisions control as to riparian rights. **Archer v. Greenville**, 233 U. S. 68; **Packer v. Bird**, 137 U. S. 661; **St. Louis v. Rutz**, 138 U. S. 242; **Kaukauna v Canal**, 142 U. S. 271; **Shiveley v. Bowlby**, 152 U. S. 44; **Hardin v. Jordan**, 140 U. S. 371; **Transportation Co. v. Mobile**, 187 U. S. 482.

A riparian owner in Mississippi owns to the thread of the stream—**usque ad filum**—subject only to the paramount public right of passage which disappears upon reliction or recession of the stream.

The first decision in Mississippi defining said rights was **Morgan v. Reading,** 3 Smed. & M. 397. (Quotation therefrom).

Commissioners v. Withers, 29 Miss., 33, stresses merely the paramount public right, but quotes to adopt the Magnolia cases as enunciating the correct doctrine.

The question again came before our court in **Magnolia v. Marshall,** 39 Miss., 109, wherein will be found one of the most luminous opinions appearing in our reports. (Quotation therefrom).

Again, in **Railroad Company v. Frederick,** 46 Miss. 9. (Quotation therefrom).

These decisions were approved in **Boom Company v. Dixon,** 77 Miss., 592, and were subject to review by the Supreme Court in **Archer v. Greenville,** 233 U. S. 68, where the reasoning is commended and the learning approved, and in virtue of which that court applied the rule hereinbefore set forth.

Now, the Magnolia cases were decided many years ago, and were lawful when made, and in virtue of their terms, contracts have been made, and these decisions have entered into all contracts made as rules of property, to impair which lies beyond the power of this Court. As said in **Lumber Co. v. State,** 97 Miss., 598. (Quotation therefrom).

Such were appellees' constitutional rights.

OF THE WESTERN BOUNDARY OF MISSISSIPPI.

Note the development as delineated in Code of 1857, where it is said: (Quotation therefrom).

Since that date, the Constitution, Sec. 3, has so expressly fixed the boundary.

Furthermore, under the joint resolution of Congress approved January 26, 1909, power is given Mississippi and Arkansas to deal with the question of boundary. In 1848, the record shows an avulsion cutting across the head of a horse-shoe that had theretofore existed, and as hereinafter shown, the riparian rights were to be irrevocably fixed. It appears from the evidence of the appellees, that Pecan Lake did not exist at that time, but had its being through a washout in July, 1857, prior to which time said land was not only in Mississippi, but was surveyed and lotted by appropriate numbers in Section 11, Township 28 North, Range 5 West.

Furthermore, the record shows no change between 1833 and 1848, which was a lapse of only fifteen years, and even the exhibit for appellant (conceded to be in no way accurate) shows the Mississippi at this point to flow directly north.

Furthermore, the river then, and ever since, has been approximately three-quarters of a mile wide which, taken as a standard, we have a question in issue as we have the question of the right to cut timber at a point exhibited to the jury, but which, by laches upon the part of the appellant, does not appear to this Court in any form. Herein we include the discredited exhibit.

Furthermore, this court knows judicially that in cutting timber, under no possibility could it be cut in a regular geometrical figure, and taking these factors, this Court must affirm under **Bunckley v. Jones,** 79 Miss., 1, by reason of the appellant's failure to present here the entire record. But taking the shore, even as surveyed by appellant, and extending from that shore one-half the distance of the average width of the river, viz., three quarters of a mile, we have included within our riparian ownership all of the lands upon which the trespasses were committed, conceding even them to be in the shape

claimed by appellant. Further, our admission of title in appellant did not extend further than to Sections 22 and 23, Township 4, Range 4, which contain 68.70 acres, and which were assessed at $275.00, and it is conceded that these 68 acres do not embrace the land in question upon which the timber was cut, or any part thereof.

Furthermore, no taxes have been paid upon anything more than this 68 acres, and presumably the State of Arkansas still continues to hold its title under the peculiar law incident to that state, whereby, contrary to the rule in Mississippi, the state retains title to the beds of all streams.

Railroad Co. v. Ramsey, 8 L. R. A. 559; **Barboro v. Boyle,** 108 S. W. 379; **Session Laws,** Ark. 1895, p. 207.

In **Polack v. Steinke,** 100 Ark., 36. (Quotation therefrom).

Southern Sand etc. Co. v. Attorney General, 180 S. W. 219.

Again, taking the probable shore of Arkansas in 1833, it is apparent that all of the timber was cut upon the Mississippi side of the thread of said stream, only to which our rights are paramount. This quite apart from whether Dustin Pond was or was not the old bed of the river, or whether or not said Pecan Lake was washed out in virtue of a broken levee as claimed. Upon appellant's map even, a creek is shown to almost join Pecan Lake on the west, and while great stress is laid thereon, yet it appears from the map itself and must be noted here.

THE BOUNDARY BETWEEN SECTIONS 22 AND 23, TOWNSHIP 4, RANGE 4 EAST, AND THE LAND OF APPELLEES, SECTION 11, TOWNSHIP 28, RANGE 5 WEST.

We have (a) An avulsion in 1848, 15 years after the survey by the United States in Mississippi, whereby the

neck of the horse-shoe formerly existing was cut through, and the bed of the Mississippi river changed, whereby the water ceased to flow through the old channel and thereafter, to the present day, has plowed through the channel then cut, so as to make the land here in controversy upon the east side of the Mississippi river. (b) The average width of the Mississippi River is shown to have been in this locality three-quarters of a mile. As to its general course, it was formerly at the point in question running almost north and south, and when the avulsion occurred, the location of the thread of the stream is such as to make it absolutely impossible to ascertain where the steamboat channel lay and it would probably have been very close to the Arkansas shore, because such would have been the shortest and most direct route. At any rate, it is left uncertain and must therefore be assumed to be equidistant from the banks which then existed and whose location at the present time can be defined with reasonable accuracy. (c) Appellant is the owner only of Sections 22 and 23, containing 68.40 acres, while appellees are the owners of all of the lots in Section 11 fronting upon the river, which contain, as surveyed, a part of the land upon which this timber was cut, and which contains absolutely on the Mississippi side all of the land in question. With these admitted facts admitted, we pass to a consideration of the establishment of the line, wherein consider:

(1) Avulsion fixes absolutely the boundaries at its date which do not thereafter vary. A most luminous discussion of this point is found in **Nebraska v. Iowa,** 143 U. S., 361, where the court said. (Quotation therefrom).

This decision has been consistently followed.

See **Shively v. Bowlby,** 152 U. S. 1, 38 L. Ed. 344.

In **Missouri v. Nebraska,** 196 U. S. 23, 49 L. Ed. 375, the court said: (Quotation therefrom).

See, also, **New Orleans v. United States,** 10 Pet. 662; 9 L. Ed. 594; **Missouri v. Kentucky,** 11 Wall. 395, 20 L. Ed. 116; **St. Clair County v. Lovington,** 23 L. Ed. 63.

The Supreme Court of Arkansas has reached as to the boundary between Mississippi and Arkansas, the same conclusion as our Court.

Cessill v. State, 40 Ark. 501; **Deloney v. State,** 88 Ark. 313; **Wolf v. Arkansas,** 104 Ark., 43.

It thus appears that this proposition has been settled for many years, and can the appellees be deprived of their property by one whose land lies on the Arkansas side of the river, when said appellant has not any title to any portion of the bed of the stream below low-water mark, and has absolutely failed to prove would-be low-water mark in this case. It affirmatively appears that appellees have only possession of a number of acres to which their deeds would give them title, plus the title to the middle of the Mississippi river, as embraced within the calls of their deed.

Authorities **supra,** especially **Morgan v. Reading** and **Magnolia v. Marshall.**

Now, when the survey of Arkansas was made in 1817, the island appears a short distance above the land in controversy, which island was neither meandered or surveyed as a part of the State of Arkansas, and from the map and plats, we respectfully submit that the principal channel of the Mississippi river lay between Arkansas and this island which, therefore, constituted a part of the original Mississippi territory, and became both in ascending and descending the river the shortest and quickest channel, for the steamboats would lay between the island and the Arkansas shore, otherwise a long detour would have been requisite. Said island, not having been meandered, we respectfully submit, belongs to

Mississippi, and the right of accretion could have no applicability where the boundary embraces land and not water.

Missouri v. Kentucky, 11 Wall. 395, 20 L. Ed. 116.

The rights of Mississippi having therefore attached in 1817, and having been conveyed to appellees, we respectfully submit that appellant is wholly without right in that regard.

Turn to the township map of Township 4, Range 4, and the acreage will be shown to be 56.33 and 12.07 acres, respectively, in Sections 22 and 23. It thus appears that these sections were surveyed down to the hundredth part of an acre, and the bank of the Mississippi was carefully meandered, and no other or further sections were located in said Township 4, Range 4. The island to which we have made reference would constitute a portion of Sections 25 and 26 had they been surveyed, but no such sections appear, and no survey made by the Government indicates their existence, and Arkansas being the owner of all land lying in the bed of the stream, appellant's rights are certainly without foundation.

Arkansas v. Ramsey, supra; Barber v. Boyle, supra; Polack v. Steinke, supra.

Had, however, this United Surveyor conceived this island to be a part of Arkansas, he would have undoubtedly surveyed it and assigned it a section number in this township and range. All things are presumed to be done justly and rightly; especially so after a lapse of one hundred years, and after by the filling in of the channel between the State of Arkansas and this island, this island become joined to the main land of Arkansas, it did not thereby in any way become a portion of Sections 22 and 23, but existed as an independent parcel, the title to which is vested in the State of Arkansas, and

with which appellant has shown not the slightest connection, even if our contention that it is a part of our riparian ownership should be denied, which we respectfully submit cannot be done upon this record.

Appellant occupies the unenviable attitude of demanding protection from the courts, when in making contribution to the government for the support of its rights, it returns 68 acres at the valuation of $275.00, and yet claims thousands of acres, in this instant case, with a valuation for a part of the timber alone running into thousands. Note the effect of failing to pay taxes upon them whereof ownership is asserted. Were the bed of the stream the property of the State of Arkansas, no taxes would be due, but if this land were not the bed of the stream and were what we cannot conceive to be the case a part of Sections 22 and 23, we would have appellant confronted by a wilful failure to bear the just burdens of the Government, and such failure would almost of necessity argue the nonexistence of the rights. Under the Code of Mississippi, Section 4264, it was requisite, if appellant claimed any of the land within this state, to make return thereof for taxation. Such return seems not to have been made, but if the land in question were in Arkansas, and were in the bed of the stream, then it would have been exempt from state taxation as the property of the sovereign, and under **McCaughn v. Young**, 85 Miss., 277, the failure to pay taxes to the state, and the failure to have this property assessed, becomes most powerful evidence of the fact that appellant was not the owner of said parcel. In that case the court said: (Quotation therefrom).

This failure can only be explained upon the basis of fraud upon the State of Arkansas.

Allegans suam turpitude nem est audiendus.

Coke's Fourth Institutes, 279.

And while the courts of law are not closed absolutely to those who come with unclean hands, yet the maxim that he who has done iniquity shall not have equity is not without its application to the law side of the docket, and here we find a course of conduct which would be a fraud if appellant were allowed to claim it, but we submit that when it is possible to so construe his acts to be both legal and illegal, it is the duty of the court to construe said acts to be legal, and when the courts have by their course of conduct fixed a certain interpretation upon their rights, that is the State of Arkansas and the appellant, that such interpretation, so thus fixed between Arkansas and appellant, will have a most powerful influence in determining the extent of appellant's right as against the appellees, especially when said rights have been found to be non-existent by a jury who saw the witnesses face to face and found their testimony not to be credible.

It appears furthermore that the only point upon which—not the appellant—but the State of Arkansas, could seek to overthrow the presumption created after this lapse of time would be to establish that the thread of the Mississippi river moved westward by accretion, and yet upon this point there is no evidence. Furthermore, it was requisite to have shown that this movement occurred anterior to the avulsion of 1848, when the river promptly dried up by reason of the cut off.

It will be perceived that the river so making a cut off has, through the cut off, a much shorter channel, and as pointed out in **Stockley v. Cissna** 119 Tenn., 152, had the effect of rendering the river bed dry land. Therefore, we have what was at one time confessedly within the territory of Mississippi and actually surveyed as such by the United States, and then we have an avulsion at a time when there are no witnesses in existence who can speak as to conditions and show that the line of Mississippi was in 1848. The only point in evidence is that

there was a cypress brake here subsequent to 1848. That existing as a fact, the title became then fixed at the center of the abandoned channel of the Mississippi river, and after that neither party could lose anything by accretion. The court may take a rule and using as a base the surveyed line laid down in 1833, and all of the land here in controversy even as claimed by appellant will be found well within the dividing line of the center of the Mississippi river, and admitting therefore for the sake of argument that the alleged cuttings occurred where they have been placed, still this would put them over a mile from any land to which the appellant is shown by this record to have title. The only land that appellant has title to consists of Sections 22 and 23, which two sections are located this distance from the land whereupon the timber was cut, and now we insist that the law of the State of Mississippi will protect the possession of the appellees when such possession was peaceable and has been unlawfully invaded without color of right in the premises by one whose nearest approximation to a right consists in the ownership of land over a mile away when the State of Arkansas has confessedly at all times retained the title to the bed of its streams. The burden of proof being upon appellant by reason of the peaceable possession of the appellees, and the actual invasion of such possession by the appellant, who stands as a trespasser, the appellant is without right in the premises, and cannot hope to succeed because it has failed utterly to connect itself at any point with the title of either the appellee or the State of Arkansas, who alone have been the true owners of the property in controversy. Note **Stockley v. Cissna,** 119 Tenn. 152, where an identical case was decided by that court. Among other things, the court said. (Quotation therefrom).

It appears that the State of Tennessee brought an action against the Pulp Company (119 Tenn. 56) predicating its right so to do upon its ownership of the bottom of the Mississippi river when said bottom became dry in

virtue of an avulsion. The propositions involved there demonstrate that if the appellees have no title, then that the title is vested in the State of Arkansas who alone could complain. Said decision is so luminous that we insert it at length: (Quotation therefrom).

We submit this decision as absolutely conclusive in the annihilation of any pretense of right upon the part of appellant. Its reasoning is unanswerable, and having under consideration the precise question now presented, there decided on its merits, we ask this Court to adopt this decision in its entirety, and thereby preclude, as to the Arkansas side of the river, any assertion of right by any one save the State of Arkansas.

It happens that upon the same controversy a suit was filed. Stockley v. Cissna, 119 Fed. 812, where Mr. Justice Lurton delivered, also, a most learned opinion covering in large measure the same ground but his reasoning is so cogent that we take the liberty to adopt his opinion also as a part of our brief. (Quotation therefrom.)

It will be perceived that the decision of this Court is not concerned with any fact, further than that the cutting of this timber was done in the bed of the Mississippi river. That point being established, and it must be conceded almost, then and of itself appellant's case falls under the decisions, as to the Mississippi side, of **Morgan v. Reading**, 3 Smedes & M. 397; **Magnolia v. Marshall**, 39 Miss., 109, and as to the Arkansas side, under **Polack v. Steinke**, 100 Ark. 36, where the Court said: (Quotation therefrom).

In addition to this, appellees have title to the timber herein controversy as demonstrated in the Pulp Company case, first, by reliction; second, by the fact that the parties appealing have no right in the premises further than to highwater mark. The property of appellant never

touches the property of the appellees. Between the two, there is always interposed that which was the half of the Mississippi river at the time of the avulsion. Appellant did not acquire title to this, but under the settled rule in Arkansas, its title stopped at the highwater mark. This is made manifest by the fact that the assessment of Sections 22 and 23, of Township 4, Range 4, is only 70 acres, and the point is thus laid down in St. Louis etc. R. Co. v. Ramsey, 8 L. R. A. 569, where it is said: (Quotation therefrom).

Furthermore, in **Barboro v. Boyle**, 108 S. W. (Ark.) 379, that Court said: (Quotation therefrom).

Later it made the same ruling in **Southern Sand etc. Co. v. State**, 180 S. W. (Ark.) 219, S. C. 167 S. W. 854, wherein a decision was had with reference to sand located in the bottom of the stream. Note that by Session Acts 1895, 217, that this property is perhaps given to the county. The record does not show that was the highwater mark in 1848 on the Arkansas side. To arrive at that point, it is essential to have evidence produced, which evidence certainly has not been found. The right of appellees to the timber under the Mississippi decisions is forcibly demonstrated in **Archer v. Greenville**, 233 U. S. 60, 58 L. Ed. 850, where it was expressly held that whether the title to the beds or streams vests in the riparian owner is a question of local law, and that in Mississippi the riparian owner has title to the thread of the stream.

Now, directly the reverse is true in Arkansas. The title of appellant is no further than the highwater mark, and, therefore, at the time of the avulsion the ownership was fixed between the parties at the highwater mark then existing, and as demonstrated in the Tennessee case, the state, and not the individual, owns the bed of the stream. The proposition was not an accretion; it was an avulsion, and by an avulsion, as settled in all of the

cases, the title does not in any way change, but on the contrary is fixed irrevocably, and an accretion after an avulsion does not confer title because the avulsion has fixed the boundaries beyond the power of change.

Therefore, for this invasion, replevin lay by appellees even though as against the State of Arkansas, we might not (conceding our contention to be ill-founded as to the location of the cutting) have been entitled to recover. Taking the water mark as delineated even upon the map introduced by appellant, and it is fully three-quarters of a mile from its nearest point to the point at which these trees were cut, and between these two points, either the appellees have title or the State of Arkansas has title, in neither event has the appellant a cause of action. These rules of law have been fixed for many years.

Rober v. Michelsen, 82 Neb., 49; **State v. Bowen,** 135 N. W. 494; **Iowa etc. Land Co. v. Coulthard,** 96 Neb. 610; **In re City of Buffalo,** 99 N. E. 852; **Marks v. Sambrano,** 170 N. W. 547; **State v. Keane,** 84 Mo. App. 130.

The actual dividing line between the fixed banks must be taken as the boundary between appellees and the State of Arkansas, and upon this point, there being no evidence at this date by which the location of a steamboat channel could be made, the middle of the river, equidistant from each bank would be fixed as the dividing line.

Suffice it to say, upon this point, in this case, there is no conflict of authority, because there is shown by State v. Keane, supra, that where the location of said principal steamboat channel does not appear, it will be presumed to be at a point equidistant between the fixed banks. This will be shown by an examination of **Iowa v. Illinois,** 147 U. S. 1, where the Supreme Court of Illinois had

reached one conclusion and the Supreme Court of Iowa had reached another. But in the instant case, Arkansas and Mississippi seem to agree, and therefore the usage having been found by the parties affected, the Supreme Court, under its express decisions, will be bound thereby.

Again, the middle is presumed prima facie to be at a point equidistant from the banks. This is shown by the quotation from Creasy on International Law at page 8 in the aforesaid opinion of Iowa v. Illinois, and furthermore, there being this prima facie presumption, and the width of the Mississippi being fixed, there is no way to overthrow it. Again, we notice that the theory in question applies to a condition where there are no islands, for the Supreme Court there expressly quoted to approve this quotation: (Quotation therefrom).

So that in the instant case, we feel that this Court will treat with respect the prior decisions of this tribunal which have been declared by the Supreme Court of the United States in Archer v. Greenville, 233 U. S., 68, quoting to approve the 6th edition of Kent's Commentaries, and containing "a frank and manly support of the binding force of the common law, on which American jurisprudence rests."

Furthermore, the Supreme Court of the United States in that very decision, with reference to our Magnolia case, said: (Quotation therefrom).

Wherefore, we respectfully submit that the judgment in this cause should be affirmed.

GREEN & GREEN,
Attorneys for Appellees.

We hereby certify that we have delivered to Messrs. Wilson & Armstrong a copy of the foregoing brief before filing the same.

GREEN & GREEN.

IN THE

SUPREME COURT OF MISSISSIPPI

OCTOBER TERM, 1916.

RUST LAND & LUMBER COMPANY,

Appellant.

v. No. 17,835.

ED. JACKSON, ET AL.

Appellees.

STATEMENT OF CASE, BRIEF AND ARGUMENT ON BEHALF OF APPELLANT, RUST LAND & LUMBER COMPANY.

STATEMENT OF CASE.

The parties are referred to in accordance with their status in the lower court, appellees as plaintiffs and appellant as defendant.

This is an action of replevin for cottonwood timber, instituted in the Circuit Court of Coahoma County, (Record p. 6).

This timber grew upon accretions formed by the Mississippi River, and the status of these accretions is the narrower question involved.

For a presentation of the questions raised, a description of the locus in quo is first essential. The jury's verdict having been in favor of the plaintiffs, all evidence offered by them is accepted as true, together with all reasonable inferences that may be drawn from this evidence. The facts will be stated in favor of plaintiffs as strong as can possibly be warranted by the record.

It is difficult, if not impossible, to visualize the situation presented without the aid of a map. Defendant's map, Exhibit No. 4, was by uncontradicted evidence shown to be correct, and will be referred to for illustrative purposes. A substantial reproduction of this map is attached to this brief as Exhibit "A" to same. Prior to 1848, immediately below Friars Point, Mississippi, the Mississippi River made a bend in the shape of an ox bow, running first South, then West, then North. In that year (1848) it cut across the head of the bow, where would have been the yoke and by this avulsion, straightened itself. (Maps Exs. Nos. 3, 23, 24 and 26.)

The present conditions are as follows:

On the what was the South end of the bend (called Horseshoe Bend) of the Mississippi River previous to 1848, there is now a large body of water, crescent shaped, and occupying practically the same position as did the river prior to 1848, or at least the Southern part of the River (Map Ex. 4 R. Pages 13, 57, 66, 172, 204.)

There was an official government survey of the State of Mississippi, in 1833-1835. The Mississippi shore of the river as meandered in that survey runs through the standing body of water above referred to, which is locally known as "Old River" on account of the fact that it is reputed to have been the bed of the Mississippi River at the time of the cut off. (R. Pages 13, 57, 66, 172, 204).

The Mississippi shore of 1833-35 is a little further

North than the present shore of "Old River," showing that the river must have cut South between 1835 and 1848, and thus have cut into the Mississippi shore. (Map Ex. 4) (R. pp. 57, 126).

"Old River" as now existent is a body of water, crescent shaped, about three to four miles long, 850 feet wide and twenty feet deep in its deepest places. It occupies what was the bed of the river prior to the cut off. From either end of it, (the N. E. and the N. W. ends) to the present Mississippi River is a well defined channel, which would fall within what was the bed of the river in 1833-1835 prior to the cut off.

Map Ex. No. 4; R. pp. 13, 29, 49, 58, 59, 75, 76, 108, 130, 132, 134, 199, 200, 205).

On the South, or Mississippi Shore of Old River, is a high well defined bank, while the bank on the North, or Arkansas Shore is flat and ill defined. Crossing "Old River" from North to South (from Arkansas Shore to Mississippi shore) the water gradually gets deeper, attaining its maximum depth next to the Mississippi shore.

(R. pp. 13, 42, 43, 55, 58, 59, 66, 67, 75, 111, 112, 189, 190, 198, 206).

About one-half mile North of Old River is a shallow slough like body of water, locally known as Dustin Pond. This body of water on the West is connected with "Old River" with a water connection probably artificial. (R. pp. 14, 48, 49, 137, 135, 136).

Dustin Pond is about 1-4 as wide as "Old River," is extremely shallow, has flat marshy banks on both sides. At its Eastern end, as a defined channel, it tapers into nothingness about half way across the interior body of land embraced within the arms of "Old River,"

though one witness insists that in times of high water there are slight indications of a former channel extending further East. (R. pp. 14, 48, 137, 77, 88, 99, 105, 110, 198, 201; Map Ex. 4, 206, 209).

The Southern shore of Dustin Pond is well timbered with old timber, which becomes gradually smaller as one goes South approaching "Old River," culminating in willows upon the North bank of that body of water. (R. pp. 79, 109, 161, 189, 197, 205).

This is the topography of the locus in quo as revealed by the record.

By stipulation, it appears that certain persons are the owners of Lots 1 to 9 inclusive of Section 11, Township 28, Range 5 West in Coahoma County, Mississippi, and that "the plaintiffs herein had the right and authority from said owners to cut the standing timber **on said lots within the calls of said owners deeds.**"

(R. p. 8).

It was also stipulated that title in fee simple to Sections 22 and 23, Township 4 South, Range 4 East in Phillips County, Arkansas, was defendant, Rust Land & Lumber Company.

(R. p. 8).

The land so stipulated as being owned by plaintiff's vendors is part of the original Mississippi shore as the same existed prior to 1835, and is on the South side of "Old River" just South and East of its Southermost point. (Map Ex. 4).

The land so stipulated as being owned by defendant is part of the original Arkansas shore, embraced within the ox bow bend of the river before the cut off, as shown

by the official government survey of Arkansas of 1816. (Map Exs. 4 and 23).

The timber involved was by plaintiff cut on the North side of "Old River" within the ox bow, between Old River and Dustin Pond. The locality where the timber was cut is colored pink upon the map Exhibit 4, and bears the legend "2780 ac. Trespass." (Map Exhibit 4, R. pages 10, 13).

Plaintiffs insist that this timber was cut from accretions to the land of their vendors in Section 11, Coahoma County, Mississippi. Defendant insists that it was cut from accretions to its lands in Sections 22 and 23, Phillips County, Arkansas.

After plaintiffs cut the timber, it was taken possession of by defendant as it lay upon the ground; and thereupon, the plaintiffs were employed for about thirty days by the defendant and assisted in getting the timber into "Old River" and binding it into a raft in order that defendant might transport it. (R. pp. 17, 21, 26, 30, 66).

The timber having been placed in "Old River," this replevin suit was instituted by plaintiffs and possession obtained of the timber. Defendant filed a bond and regained possession. (R. pp.).

The case was tried at Friars Point, Mississippi before His Honor, Judge T. B. Watkins, and a jury, and a verdict rendered in favor of plaintiffs and against defendants, for $3,600.00, this being the amount fixed by the jury as the value of the timber. (R. pp. 231).

Appellant has perfected its appeal and assigned its errors. It is not necessary here to repeat them verbatim. The questions they raise are:

First; The question upon whom was the burden of

proof to show a right to the possession of the timber.

(A). The court instructed the jury for the plaintiffs that if they cut the timber in good faith by authority of their vendors who **claimed** the lands from which it was cut as accretions to their lands, "and the defendant by threats or intimidation took the timber away from them, then the plaintiffs have made out a prima facie case, and it devolves upon the defendant to show by a preponderance of the evidence that it is the **owner** of the land from which the timber was cut before defendant can recover in this case." (R. p. 224, Sixth Assignment of Error).

(B). For the plaintiffs the court further instructed the jury, "that unless the Rust Land & Lumber Company has shown to the satisfaction of the jury, by a preponderance of the evidence, that the lands from which the timber in controversy was cut was a part of the accretions to the land belonging to the Rust Land Company, in the State of Arkansas, or was North and East of the Channel of the Mississippi River where the cut off in 1848 occurred, then they will find for the plaintiffs." (R. p. 224, Seventh Assignment of Error).

(C). The court refused an instruction requested by defendant to the effect that plaintiffs could not recover "unless the proof shows by a preponderance of the evidence that the timber was cut growing on the lands belonging to the grantors or of their plaintiffs or some of them." (R. p. 230, Tenth Assignment of Error).

Second; The question of whether defendant was entitled to a direct verdict. (R. pp. 8, 22, 228. First, Second and Eighth Assignments of Error).

BRIEF.

PROPOSITIONS OF FACT.

I.

The articles replevied consisted of timber severed from realty, of which plaintiffs did not have actual adverse possession. (R. pp. 10, 13, 17, 21, 26, 30 and 66).

II.

After defendant took possession of the timber, plaintiffs entered its employ and worked for thirty days, assisting defendant to perfect its possession of the timber. (R. pp. 17, 21, 26 and 30).

III.

The land from which the timber was cut is North of what was the main channel, that is the deep water channel of navigation of the Mississippi River prior to 1848. (R. pp. 29, 42, 43, 49, 57, 58, 59, 75, 108, 130, 132, 134, 172, 189, 190, 199, 200 and 205).

IV.

The land from which the timber was cut was joined to defendant's land by the gradual recession, or reliction of the waters. (R. pp. 13, 42, 43, 55, 58, 59, 67, 75, 79, 109, 161, 189 and 197).

PROPOSITIONS OF LAW.

I.

The burden of proof was upon plaintiffs to show their right to possession.

Mississippi Code, 1906, Sec. 4214.

Buck v. Payne, 52 Miss., 271.

Austin v. Terry, 88 Pac., 198.

Brunson v. Volunteer Carriage Company, 93 Miss., 793.

II.

The instructions, stating that the defendants could only prevail in case they proved ownership to the land, were erroneous because plaintiffs not being in possession, could only recover provided **they** showed ownership to the land.

Shinn on Replevin, Sec., 280, Note 80 Am. State Rep. 741; Note 69 L. R. A., 732.

Richbourg v. Rose, 44 Southern 69, (Fla.)

Lieberman, Loveman & O'Brien v. Jas. N. Clark, 114 Tenn., 117. Note 89 Am. Decisions, 427.

Cobby on Replevin, 2nd Ed., page 354.

Wells on Replevin, Sec. 73.

North Shore Boom & Driving Co. v. Nicomen Boom Co., 101 Pac., 48, (Washington).

Hungerford v. Redford, 29 Wis., 345.

David Hart v. G. W. Vinsant 6 Heis., 616, 53 Tenn., 616. Note 69 L. R. A., 732.

The plaintiffs being merely on the land for the purpose of cutting timber, were not in adverse possession of the land.

Cobby on Replevin, 2nd Ed., Sec. 88.

Ellsworth v. McDowell, 44 Neb., 707, 62 N. W., 1082; 89 Am. Decisions 427.

Phillips v. Gastrell, 61 Miss., 43.

III.

The instruction set out in the sixth assignment of

error, stating that the defendant could not prevail, unless it showed itself to be the owner of the land, was erroneous because defendant was in any event entitled to prevail if it showed itself to be an actual occupant of the land. See authorities supra under II.

IV.

Plaintiffs having assented to defendants possession and assisted in perfecting it, thus recognized the rightfulness of defendant's possession, and are not entitled to maintain an action of replevin.

Benjamin B. Frizzell v. John White, 27 Miss., 198.
Taplin v. Wilson, 6 N. Y., Supreme Court (Thompson & Coate) 502.

V.

The land on which the timber was cut, being North of the thread or deep water channel of the river as it ran prior to 1848, was within the State of Arkansas, and this prevented plaintiffs having any title to the land.

Hendley's Lessee v. Anthony, 5 Wheat., 374.
Iowa v. Ill., 147 U. S., 1.
Mo. v. Neb., 196 U. S., 23.
Louisiana v. Mississippi, 202 U. S., 1, 49.
Moore v. McGuire, 203 U. S., 214.
Washington v. Ore., 211 U. S., 127.
Washington v. Ore., 214 U. S., 205.
Iowa v. Ill., 147 U. S., 1.
Keokuk & Hamilton Bridge Co., v. Ill., 175 U. S., 625, 631.
Louisiana v. Mississippi, 202 U. S., 1.
Iowa v. Ill., 202 U. S., 59.
Washington v. Oregon, 211 U. S., 127.
Washington v. Oregon, 214 U. S., 205.
St. Louis v. Rutz 138 U. S., 226.

Neb. v. Iowa, 143 U. S., 359.
Mo. v. Neb., 196 U. S., 23.
Mo. v. Kansas, 203 U. S., 78.

VI.

The water having gradually left the defendant's land, and thus the land from which the timber was cut having been joined to defendant's land, title to this land was in defendant.

Warren v. Chambers, 25 Ark., 120, 4 Am. St. Rep. 23, 91 Am. Decisions, 538.

Harrison v. Fite, 78 C. C. A., 147, 148 Fed., 781. (Circuit Court of Appeals for 8th Circuit).

Naylor v. Cox, (Mo.) 21 S. W. 589.
Nix v. Pfeifer, 83 S. W. 951, 73 Ark., 199.
Barboro v. Boyle, 178 S. W., 378 (Ark.)

ARGUMENT.

Sixth, Seventh and Tenth Assignments of Error Burden of Proof and Plaintiff's Right to Maintain an Action of Replevin.

On the threshold of this case, one is met with the question of upon whom was the burden of proof to show a right to the possession of the logs involved. Another phase of this question is whether or not—aside from defendant's right to the logs—plaintiffs have shown a right in themselves to maintain an action of replevin.

The matter can, perhaps, most succintly be presented by referring to the general rules of law governing the right to maintain a suit for replevin, and the burden of proof in such cases, and then applying those rules to the facts of this particular case.

Let it be remembered that the question here involved is the right to maintain an action of replevin for articles **severed from the realty.** This question has been the subject of decision in many analytical opinions. As a result, the principles involved are established with a degree of great definiteness.

An action of replevin, being a possessory action, always and everywhere, the one essential question involved is the right to possession. "It is axiomatic that a party who sues in replevin must have the right of immediate possession either in virtue, of a general property as owner, or a special property as bailee at the time he sues."

Buck v. Payne, 52 Mississippi, 271.

To the same effect is the Mississippi Code of 1906, Section 4212, which provides that in actions of replevin, the affidavit must provide "That he, (plaintiff) is entitled to the immediate possession" of the property replevied. It is equally axiomatic the the burden of proof is on the plaintiff to show his title and right to possession. He must recover, if at all, "upon the strength of his own title, and not upon the weakness of that of his adversary."

Austin v. Terry, 88 Pac. 189.

Brunson v. Volunteer Carriage Co., 93 Miss., 793.

In actions where the articles sought to be replevied have been severed from the realty, the action of replevin cannot be used to try title to the realty. The true rule is that if any one is in actual adverse possession of the realty, by virtue of this possession he has possession of articles severed from the realty. This possession is suf-

ficient to entitle him to maintain the action of replevin against trespassers, against those not in actual adverse possession of the land. The true owner cannot maintain the action of replevin for timber cut from the realty, as against one in actual adverse possession.

Where, however, there is no actual adverse possession of the land, as where the land is wild and unenclosed, the question of title to the realty is necessarily involved incidentally because the constructive possession is in the true owner of land. Where, therefore, the land is wild and unenclosed, in an action of replevin for timber severed from the land, that party prevails who shows the title to the land in himself, because being thus the owner of land not in adverse possession of any one else, he has constructive possession of the land, and ipso facto constructive possession of the timber severed from the land. Where neither party is in possession of the land, and where neither party can show an actual title to the land, then plaintiff in replevin suit for timber severed from the land must be cast, because the burden of proof is upon him to show the right to possession of the articles involved in the suit. In such case, he has not actual adverse possession of the land, which would give him actual possession of the timber severed. He has no actual title to the land, which would give him constructive possession of the timber severed. This constructive possession is in the true owner, whoever he may be, and thus, the plaintiff, having failed to meet the burden upon him of showing a right to possession, cannot prevail. These principles are supported by numerous authorities:

See Shinn on Replevin, Section 280. (Quotations therefrom).

Note 80 American State Reports, 741, 758. (Quotations therefrom).

69 L. R. A., 732—Note. (Quotation therefrom).

Richbourg v. Rose, 44 Southern 69 (Fla.) (Quotation therefrom).

See also Note 89 American Decisions, 427.

These authorities establish the rules when there is any possession of the land. But the rules when the land is not in actual possession of any one are equally well established. Although the authorities hold that ordinarily, the question of title to the land is not involved in a replevin suit, as said by the Supreme Court of Tennessee. (Quotation therefrom).

Hart v. Vincent, 6 Heis, 616:

> "Even (in) such a case evidence of title is permitted 'not for the purpose of trying the question of title to the land,' but for the purpose of determining the question of possession."

Lieberman, Loveman & O'Brien v. James N. Clark, 114 Tenn., 117.

Note 89 Am. Decisions, 427-431: (Quotation therefrom).

Cobby on Replevin (Second Edition) Sec. 7, p. 354. (Quotation therefrom).

Section 73, Wells on Replevin.

As illustrating these principles, it was held in North Shore Boom & Driving Company v. Nicomen Boom Company, 101 Pac. 48, (Washington), that where logs which floated out of the boom were received by defendant, and replevied by plaintiff, who maintained the boom, in that in as much as plaintiff was a trespasser, and in maintaining the boom he could not replevin the logs regardless of

whether or not the title was in defendant. The Court said:

> "Yet, the plaintiff in a replevin case must prove his right to the possession of the property demanded. It is not sufficient to show that defendant is not entitled to possession. The pertinent question is whether the proof sustains the plaintiff's claim, or right to possession."

Another pertinent case is Hungerford v. Redford, 29 Wis., 345, from which we excerpt: (Quotation therefrom).

A more closely analogous case to the one at bar is that of David Hart v. G. W. Vinsant, 6 Heis., 616, 53 Tenn., 616. The facts in that case were: (Quotation therefrom).

For a general discussion of these principles, see the elaborate note in 69 L. R. A., 732. In regard to what is actual adverse possesion of the land so as to give one a right to maintain the action of replevin, it is well settled that:

> "A possession of property obtained by trespass cannot be made the basis of an action of replevin."

Cobby on Replevin, Second Edition, Section 88, citing Ellsworth v. McDowell, 44 Nebraska, 707, 62 N. W., 1082. (Quotation therefrom).

Note 89, American Decisions, 427, 430.

This question has, in fact, been foreclosed by this Court in the case of Phillips v. Gastrell, 61 Miss., 43, wherein it is held that the mere fact that one has camped upon land and cut timber, was not adverse possession of

the land by that one; and wherein, it was further held that under such circumstances, the true owner had a right to maintain replevin. These authorities then established the following principles:

1st. The burden of proof is upon the plaintiff in an action of replevin to show his right to possession.

2nd. In an action of replevin for articles severed from the realty, that person is entitled to prevail who has actual adverse possession of the realty, which carries with it the possession of the article severed.

3rd. If no one has actual adverse possession of the realty, then the title may be inquired into, and the true owner must prevail, because in the absence of adverse possession, he has constructive possession of the realty, and ipso facto constructive possession of the articles severed from it.

4th. Where neither the plaintiff, nor defendant in an action of replevin for articles severed from the realty can show actual adverse possession of the realty, or actual title to same, then the defendant must prevail because the plaintiff has failed to meet the burden the law puts upon him to show the right to possession.

Applying these principles to the facts of this case, we find the only proof in the record in regard to any title of plaintiff's vendors is that:

> "The title in fee simple to lots 1 to 9 inclusive of Section 11, Township 28, Range 5 West in the County of Coahoma, State of Mississippi; Tennessee." (R. p. 8).

The stipulation further provides that:

> "The plaintiffs herein had the right and au-

thority from said owners to cut the standing timber on said lots within the calls of said owner's deeds." (R. p. 8).

It is not contended by any one that any of these lots extend to the North of "Old River," where the timber was cut. It is fully shown by the map, "Exhibit 4," that these lots bordered on the South bank of "Old River." It also clearly appears by uncontradicted evidence that neither plaintiffs nor their vendors ever had any actual adverse possession of the occupancy of this land where timber was cut. One of the plaintiffs testified as follows:

(Isom White, R. p. 23)

Q. What, if any, acts of possession, Isom, did Charlie McGhee, King & Anderson and Ellen Jackson and Jo Williams, the owners in Section 11, with whom you had a contract to cut this timber, exercise over this land where you cut this timber?

A. They had claimed it for twelve years to my knowings.

Q. What had they done in there, if anything?

A. Yes sir, got them some firewood off of there.

Q. What else?

A. That's all."

(See also R. pp. 61 and 62).

Plaintiffs did not even camp on the land when they cut the timber, but made forays across "Old River," returning to their homes at night. Under the holdings of Phillips v. Castrell, supra, it is, therefore, clear that there was no adverse occupancy or possession of the land, either in plaintiff's vendors, or plaintiffs themselves.

After the timber was cut, it was left lying on the land, where it was felled, and was there when taken possession of by defendant. Plaintiffs were not present when the timber was taken possession of by defendants, but were on the South Side of "Old River," at their homes in Coahoma County, Mississippi. (R. pages 10, 15, 25, 65).

This fully appears from the following testimony of one of the plaintiffs:

(Testimony of Zanders Parker, R. p. 16).

"A. Yes sir, we cut it between Pecan Lake and Dustin Pond.

Q. It was there that these gentlemen came to you?

A. They came to me on this side of the levee, over home there where I live at.

Q. Where was this timber then?

A. Where we cut it.

Q. You were not there where the timber was when they came to you?

A. No sir."

In fact, the high water was then rising and about to reach the timber. The situation is thus detailed by same witness:

(Testimony of Zanders Parker, Record p. 17):

Q. Did you turn it over to Mr. DeSha?

A. Yes sir, we didn't bother it any more.

Q. Did he pay you anything for cutting it?

A. No, sir.

Q. What sort of an agreement did you make with him about rafting it, you and these other parties?

A. We were to put it out to the lake and raft it for a dollar a thousand.

Q. Out into the river for a dollar a thousand?

A. Into the lake.

Q. Well, was the water up then, or low water stage then?

A. When?

Q. When this conversation occurred?

A. Well, the water was just rising, coming in there then.

Q. Hadn't gotten over to where the timber was cut?

A. It had reached some of it."

Plaintiffs, therefore, were not even on the land when possession was taken of the timber by defendant, but were across "Old River" in the State of Mississippi; whereas, the timber had been left lying where felled with the rising water about to reach it. It fully appears from the record that the presence of the sheriff, with the agent of defendant, was intended as a warning against future trespass; and that the timber was not actually taken out of the plaintiff's possession, because it was left lying on the land, of which they had no possession; and was in no sense in their possession.

After the defendants took possession of the timber, all of the plaintiffs assisted the defendant in fixing its possession of the timber, binding it in the form of a raft, and getting it into "Old River," working on this for about a month. (Record pages 17, 20, 26, 27, 29, 30 and 66).

We have, therefore, certainly a case where the plaintiffs were not in actual adverse possession of the land, nor had they any possession of it, and where yet they are seeking to maintain an action of replevin for timber severed from it. In such a case as we have already seen, they can only maintain the action by showing that title to the realty, from which it was severed, was in them.

It was not insisted in the lower court, and will not, we suppose be insisted here, that the undisputed evidence shows that title to this realty was in plaintiff's vendors, on account of it being alleged to be accretions to their land. The most that has ever been insisted in this regard is that the question of the ownership of plaintiff's vendors, was a question of fact for the jury. And yet, in this situation, the plaintiffs showing no possession to the realty, nor title to it, and seeking to maintain an action of replevin for timber severed from it, the learned Trial Judge instructed the jury that if the plaintiffs cut timber in good faith by authority of their vendors, who claimed the lands from which it was cut as accretions to their lands, and the defendants by threats, or intimidation took the timber away from them, "then the plaintiffs have made out a prima facie case; and it devolved upon the defendant to show by a preponderance of the evidence that it is the owner of the land from which the timber was cut before the defendant can recover in this case." (R. page 224).

The Court further instructed the jury that unless the defendant had:

> "Shown to the satisfaction of the jury by a preponderance of the evidence that the lands from which the timber in controversy was cut was a part of the accretions, belonging to the Rust Land & Lumber Company, in the State of Arkansas, or was North and East of the channel of the Mississippi River, where the cutoff in 1848 occurred, then they will find for the plaintiffs." (R. page 234).

The Court refused an instruction requested by the defendant in that plaintiffs could not recover:

> "Unless the plaintiffs show by a preponder-

ance of the evidence that the timber was cut growing on the lands belonging to the grantors of these plaintiffs, or some of them." (R. page 220).

The giving of these two instructions for the plaintiff was manifest error, because they directed the jury to return a verdict for plaintiff, unless the defendant by a preponderance of the evidence showed itself to be the owner of the land, from which the timber was cut, whereas, the true rule is that the plaintiffs, having cut timber from the land of which neither they, nor their vendors has possession could only maintain an action of replevin for such timber by themselves showing by a preponderance of the evidence that the title was in them, or their vendors. This results from the rule above stated, that where timber is cut from unoccupied land (pretermitting for the present the question of defendant's possession) an action of replevin can only be maintained by that person who shows true title to the land, because of the fact that the constructive possession of the timber is in the true owner of the land who has constructive possession of the land, in the absence of any actual adverse holding against him, and where no true title is shown either in plaintiff, or defendant in a replevin suit, the plaintiff must be cast because he has failed to meet the burden of proof, with which the law **onerates** him.

The instructions requested by defendant should have been given, because it clearly states the law certainly as favorably as it could be stated for the plaintiffs. This instruction is to the effect that plaintiffs could not recover unless they show that true title to the land was in them, or their vendors. This is the rule, because they having the burden of proof to show a right to possession and having no actual adverse possession of the land, can only meet this burden by showing title and constructive possession of the land either in themselves, or their vendors, regardless of whether or not either the true title, or the actual possession was in defendant.

We take it that it will not be insisted by learned adversary counsel that there is any evidence in the record that actual adverse possession of the land was in plaintiff's vendors, because there is absolutely nothing in the record to sustain such an insistence. But if this insistence should be made, the result would be simply that it would have been a question of fact for the jury, as to whether or not the land was in the actual possession of the plaintiff's vendors, and the instructions given for the plaintiff, and hereinbefore referred to, would still be erroneous, be cause they flatly state that the burden of proof was upon the defendant to show title to the land, and if the question of possession were one of fact for the jury, these instructions could not have been correct, unless prefaced by the proviso that such burden of proof was upon defendant, provided plaintiff showed actual adverse possession of the land.

For the reasons above set out, therefore, the giving of the instructions complained of in the sixth and seventh assignments of error, and the refusal of the one set out in the tenth assignment of error were material errors. In addition to the matters already urged under these assignments of error, however, the instruction complained of in the sixth assignment of error is manifestly erroneous for another reason. In that instruction, the court instructed the jury that if plaintiffs cut the timber in good faith, by authority of their vendors, who claimed the lands from which they cut as accretions; "and the defendant by threats, or intimidation took the timber away from them, then the plaintiffs have made out a prima facie case, and it devolves upon the defendant to show by a preponderance of the evidence that it is the OWNER of the land from which the timber was cut before the defendant can recover in this case." This instruction declares the law to be that when one cuts timber under claim to it, and is himself the plaintiff in a replevin suit for this timber, he can only be defeated

by the defendant showing that he was the owner of the land from which the timber was cut.

We have already seen that this is not the law, and that everywhere, and under all circumstances, in order for one either to defeat, or maintain an action of replevin for timber severed from the realty, it is only necessary for that one to show not that he was the owner, but that he had the actual possession of the land when the timber was cut. Even, therefore, if the burden of proof had been upon defendant to show his right to the timber, this right could have been shown by showing actual occupancy and it was not necessary to show actual ownership. This instruction, therefore, onerates the defendant with a heavier burden than the law imposes, and is for that reason vitally erroneous.

There is in the record ample evidence sufficient to go to the jury upon the question of the defendant's occupancy and adverse possession of the land at the time the timber was cut. The defendant has, on the body of land known as Horseshoe Island, three cleared and fenced fields. One of these fields is entirely upon the original Arkansas shore, and has been leased and cultivated for many years; one is partially upon the original Arkansas shore, and partially upon the accretions, and one is entirely upon the accretions between Dustin Pond and "Old River," close to where the timber was cut. (R. pages 69, 72).

This field so located between Dustin Pond and "Old River," close to where the timber was cut, had been enclosed in wire fence for about six or seven years at the time the timber was cut. (R. pages 81, 212, 213). In addition, the defendant has in its employ a caretaker, who has charge of this entire tract of land, including that part in which the timber involved in this case was cut. This man goes over these lands about once a month. (R.

pp. 204, 206, 110). Whenever any timber has blown down by wind, the defendant has removed it and sold it; and whenever any timber has been threatened on account of caving banks, or any other reasons, the defendant has protected it and conserved it. (R. pp. 80, 210). Defendant has always treated anyone entering the land, or cutting timber, or for any other purpose as trespassers. (R. 207, 208); and in fact, the situation is thus expressed in the language of one of the defendant's witnesses:

> "I can only tell for the last four years, during that time it, (defendant) exercised full control over the entire island up to the North bank of "Old River." (R. p. 160).

It is to be remarked that this land was timber land between the levee and the river, and subject to overflow. It is further to be noticed that to part of this land, the original Arkansas shore, including fractional Sections 22 and 23, the defendant had admittedly a valid legal title, but defendant exercised the same acts of ownership and occupancy over that part of the land between Dustin Pond and "Old River" that it did over that part which it was candidly the true owner.

In the language of McCaughn v. Young, 85 Miss., 277:

> "This was the same character of control which he exercised over other property which he owned, and was the only manner in which any one could at the time in question have asserted ownership, or exercised dominion over property of the same character similarly located."

The facts of that case (McCaughn v. Young) are strikingly similar to the facts of this case, and under the authority of that case, we submit that to say the very least, the question of whether defendant had actual oc-

cupancy and adverse possession of the land was one of fact for the jury.

If this be true, then the instruction complained of in the sixth assignment of error was clearly erroneous as denying to the defendant the right to a verdict, unless it proved itself the owner of the land, whereas, it was certainly entitled to a verdict if it had the actual occupancy and adverse possession of the land at the time the timber was cut.

Considered as placing the burden of proof upon the defendant, these instructions are erroneous for another reason, and for this same reason, according to the undisputed evidence, the plaintiff had no right to maintain an action of replevin. It is, of course, horn book law that a plaintiff can never maintain an aqtion of replevin against the defendant unless the possession of the defendant is wrongful. Where the defendant's possession is rightful, an action of replevin cannot be maintained.

It has been many times held, for example, that where a plaintiff delivers possession of a certain article to defendant, he cannot later maintain an action to recover it, because the defendant's possession is rightful. (See Benjamin B. Frizell v. John White, 27 Miss., 198; Taplin v. Wilson, 6 N. Y., sup. Ct. (Thompson & Coats, 502.)

In the last above cited case, the defendant, who was the father of the plaintiff's wife, gave her some furniture, and gave to her other furniture to be used during her life, and if she died childless, to go back to the defendant. The wife died childless. The defendant demanded the furniture, and the plaintiff, after deliberation and legal advice, gave it up. It was held that plantiff could not recover the property. The court saying: (Quotation therefrom).

In this case, the defendant took possession of the

timber while it was lying where it was cut. No one was in possession of the timber when defendants took it. (Testimony of DeShaw R. p. 61).

It is true that the plaintiffs say that after this time the defendant's agents came into the state of Mississippi, and threatened them with prosecution if they molested the timber. However, plaintiffs, themselves, testified that after this time, they consulted their attorneys and after due deliberation, hired themselves to the defendant for the purpose of perfecting defendant's possession to this very timber.

They worked at this task for about thirty days. We submit that this action on the part of plaintiffs was a ratification of the possession of the defendant, equal to a voluntary surrender of the possession on their part, which disentitles them to maintain an action of replevin. Certainly under this state of facts, it would seem that the jury should not be peremptorily instructed as was done—that burden of proof was upon the defendant to show its title to the timber, but that these instructions should have at least been modified by a proviso, embracing the idea that if the plaintiffs entered the employ of the defendant for the purpose of assisting defendant in perfecting its possession, and with the intent of voluntarily surrendering their claim to the timber, then they would not be entitled to maintain an action of replevin. Certainly, if this was the situation, the burden of proof would be upon the plaintiff, and not upon the defendant.

The instructions as given, however, ignore absolutely this action of plaintiffs, and the jury was unqualifiedly instructed that the burden of proof was upon the defendant.

For these reasons, therefore, we insist that it was materially vitally erroneous for the trial judge to give to

the jury the instructions set out in the sixth and seventh assignments of error; and to refuse that set out in the tenth assignment of error; and that for these reasons, aside from all other questions, the case should be reversed.

FIRST, SECOND AND EIGHTH ASSIGNMENT OF ERROR.

The Court should have directed a verdict in favor of defendant. The undisputed evidence shows that neither plaintiffs, nor their vendors had either actual occupancy, adverse possession, or title to the land where the timber was cut.

Plaintiffs claim that their vendors have title to the land where the timber was cut as an accretion to Lots 1 to 9 inclusive; Section 11, Township 28, Range 5 West, Coahoma County, Mississippi. Defendant insists that the land in question could not be an accretion to this land, because the undisputed evidence shows that it is within the State of Arkansas. This insistence is founded upon the further insistence that this land is North of "Old River" which lies between it and the land of plaintiff's vendors in the State of Mississippi; that "Old River" was the thread, or deep water and navigable channel of the Mississippi River in 1848, and was at that time, and is now the boundary between the States of Arkansas and Mississippi.

Passing first to the authorities with regard to the boundary line between the two states, the State of Mississippi was admitted into the Union of the United States of America by the Act of Congress found in the United States Statutes at Large, Vol. 3, Chapter 23, page 348, approved March 1, 1817, whereby the inhabitants of the then Mississippi Territory were authorized to form for themselves a State Constitution, and to be admitted into the Union, the boundaries of the then-to-be created States

being described as follows: (Quotation therefrom).

On June 23, 1836, by chapter 120 of the Acts of 1836, the State of Arkansas was admitted into the Union, and the description of the boundary thereof was: (Quotation therefrom).

It is insisted that a correct interpretation of these acts, admitting the two states into the Union requires that the line be run along the center of the main channel of the river, and that by "main channel" is meant the channel of navigation—the deep water channel:

Hendley's Lessee v. Anthony, 5 Wheat., 374.
Iowa v. Ill., 147 U. S., 1.
Mo. v. Neb., 196 U. S., 23.
Louisiana v. Mississippi, 202 U. S., 1, 49.
Moore v. McGuire, 203 U. S., 214.
Washington v. Ore., 211 U. S., 127.
Washington v. Ore., 214 U. S., 205.

The tortuous course of the Mississippi River, producing on one side thereof a sloping bank, on which sand bars form, in throwing the main channel or channel of navigation along the other bank, makes it essential, if each State is to have preserved to it an interest in the navigation of the river, that the line be run as insisted by the defendant or as was well said by Mr. Justice Field, in Iowa v. Illinois, supra: (Quotation therefrom).

Or as Mr. Chief Justice Fuller said in Louisiana v. Mississippi, supra: (Quotation therefrom).

And in the case from which the above quotation is taken, Iowa v. Illinois, supra, is approved.

As already stated, in Iowa v. Illinois, 147 U. S., 1, it was held that "when a navigable river constitutes the boundary line between two independent states, the line

defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream." It was also held in said case that the terms "middle of the Mississippi River" and "middle of the main channel of the Mississippi River" and "the centre of the main channel of that river" were synonymous.

The rule announced in Iowa v. Illinois has been repeated and declared by the Supreme Court of the United States to be the correct rule, and that case has been several times cited with approval.

Keokuk & Hamilton Bridge Company v. Illinois, 175 U. S., 625,631.

Louisiana v. Mississippi, 202 U. S. 1, 49.
Iowa v. Ill., 202 U. S., 59.
Washington v. Oregon, 211 U. S., 127, 134.
Washington v. Oregon 214 U. S., 205, 215.

And the avulsion of 1848, that is the "cut off" left the boundary line between the two states where it was just preceding the sudden abandonment of the old, and the making of a new channel.

St. Louis v. Rutz, 138 U. S., 226, 245.
Nebraska v. Iowa, 143 U. S., 359.
Mo. v. Neb., 196 U. S., 23.
Mo. v. Kansas, 213 U. S., 78.

That the rule as we have stated it is correct is practically conceded by plaintiffs in the elaborate brief of their counsel filed in this cause on the motion to set aside the continuance, in which brief, on page 104, they say:

> "It is true that the Supreme Court of the U. S., has held in question of sovereignty that the

middle is to be fixed at the middle of the principal steam boat channel."

Plaintiff's land, of course, cannot extend beyond the Mississippi state line. We insist that the undisputed evidence shows that "Old River" was the deep water, or navigable channel of the Mississippi River at the time of the "cut off" and is now the boundary line between the states of Arkansas and Mississippi. We have already, in our statement of the case, detailed the evidence on this feature, and referred to the pages of the record. We briefly recapitulate:

The meander line of 1833-35 survey runs through "Old River." This body of water has the typical crescent shape found in bends of the Mississippi River. It is locally known as "Old River." This shows that the general tradition is that it was in fact, the bed of the Mississippi River. A well defined channel leads from either end of it to the present Mississippi River. The timber gradually becomes smaller, growing South and approaching "Old River." There is a high bank on the South and deep water on that side. These things, we insist, show beyond any possibility of contradiction that "Old River" was not only the bed of the Mississippi River at the time of the avulsion, but that it was the last stand of the river—the main channel. These things thus showing this, are reinforced by the fact that it is a matter of common observation in an abandoned channel of this kind that the deepest portion of the channel is the last to fill; and it is a well known fact of which this Court will take judicial notice that in bends of this kind on the Mississippi River, the deep channel is on the concave side of the bend, next to the high bank. The proof in the record also shows this, and shows that in this particular instance, the accretion came down from the Arkansas shore, thus forcing the current against the Mississippi bank. These things are proven beyond dis-

pute, and we submit, necessitate the conclusion that "Old River" is the line between the states and that the lands of plaintiff's vendors cannot extend beyond it; that the timber having been cut North of "Old River" was cut certainly within the confines of the State of Arkansas from the land to which the plaintiff's vendors had no title, and in which they had no interest.

The burden of proof—as heretofore shown—being upon the plaintiffs to show their title to the land from which the timber was cut, and the uncontradicted evidence showing the lack of such title, the defendant was necessarily entitled to a directed verdict.

We further call the court's attention to the fact that the stipulation in the record as to title is that:

> "The plaintiffs herein had the right and authority from said owners (that is the owners of Lots 1 to 9 inclusive) to cut the standing timber on said lots **within the calls of said owners' deeds.**"

In other words, the only claim asserted by plaintiffs is their contract with the owners of Lots 1 to 9 inclusive. They had from these owners, simply the right to cut the timber on these lots within the calls of the deeds. This certainly did not give them the right to cut on the accretions to these lots; and thus, the stipulation itself precludes the idea that the plaintiffs had no right to cut timber North of "Old River."

Regardless, therefore, of the defendant's possession or title, we insist that the undisputed evidence showing the defendants had no possession of the land, nor title to it, and the burden of proof being upon them, to show such possession, or title, a verdict should have been directed for the defendant.

THE UNDISPUTED EVIDENCE SHOWS THAT THE TRUE TITLE TO THE LAND WHERE THE TIMBER WAS CUT WAS IN DEFENDANT.

We have heretofore seen that in as much as the plaintiffs had no actual adverse possession of the land where the timber was cut, they certainly could not maintain an action against the true owner in whom was the real title. This true owner, we submit, was the defendant.

We have already presented to the court our views on the question with regard to the line between the states. It is our insistence that the facts we have detailed show indisputably that the true boundary line between the states of Arkansas and Mississippi is "Old River." We shall not repeat that argument. We only add that in a case of this kind, where a change in the course of the river occurred at a time back to which the memory of man runneth not, and where the mute memorials left by the river are so significant, the Court should be reluctant to disregard the history of this locality so plainly written upon the earth's surface by Him, who made the river and who directed and changed its course in favor of mere conjecture. This character of evidence is not only the best evidence the nature of the case admits of, but the record is plainly made unmistakably, unalterably and imperishably.

> "The moving finger writes, and having writ moves on!"

Assuming then that this land is within the State of Arkansas, we insist that under the facts of this case, as shown by the record, the title is in the defendant.

This contention, we base upon the fact that the record shows that after the cut off was made, the water

gradually receded from defendant's land, and uncovered this land upon which the timber grew. This is "reliction." This land being in Arkansas, the title of the defendant is to be determined by the laws of Arkansas, and under the laws of Arkansas, land uncovered by reliction, that is by the gradual withdrawal of water (whether navigable or unnavigable) from it, belongs to the riparian owners, from whose shore the water withdrew. The rule is thus stated by the Supreme Court of Arkansas in the case of Warren v. Chambers, 25 Ark., 120, 4 Am. Rep., 23, 91 A. D., 538. (Quotation therefrom).

It is insisted by the learned adversary counsel that in as much as "Old River" was formed by avulsion (the cut off of 1848) that the doctrine of reliction could not apply and, therefore, that defendant could gain no land by accretion, or reliction of the cut off.

In their brief, upon motion to set aside the continuance, plaintiffs cited in support of this proposition, State of Tennessee v. Muncie Pulp Company, 119 Tenn., 47, and Stockley v. Cissna, 119 Tenn., 135. These cases are diametrically opposed to the rulings of the Supreme Court of Arkansas. In the first of these cases, the Supreme Court of Tennessee says: (Quotation therefrom).

The first part of this statement is nothing more or less than a denial of the applicability of the doctrine of reliction in regard to navigable streams, and is in direct conflict with the case of Warren v. Chambers, supra. Another case that arose in Arkansas and was decided by the Circuit Court of Appeals of the eighth circuit is the case of Harrison v. Fite, 78 C. C. A., 147-148 Fed., 781, in which it was held that where a lake, which was formed by the New Madrid earthquake, and gradually became unnavigable by reliction, or gradual recision of water that the bed belonged to the riparian owners, so that they could even prevent others from hunting and fishing in what had formerly been the bed of the lake. This Court,

of course, is governed by these Arkansas decisions, and we submit that they are entirely consonant with reason. If it is to be held that the doctrine of reliction has any application, we submit that it is entirely immaterial how the body of water to which it is applied was formed.

What possible difference can it make in applying this doctrine, whether a lake was formed by an earthquake prior to the time when the country was inhabited, or whether it was formed by a cut off of the river at the same time. If it be assumed that a lake more or less permanent in nature was formed, the cause of its formation is immaterial. The real test as to whether the doctrine of avulsion or reliction applies, is whether or not the water immediately receded so precipitately that the eye could follow it in its course, or whether there was a gradual reliction.

In this case, the cut off occurred sixty-eight years ago, and there is still a permanent lake. On the facts, this is sufficient to distinguish the case at bar from State of Tennessee v. Muncie Pulp Company and Stockley v. Cissna, because in this case, the water was immediately withdrawn from the old river bed. The real test, therefore, is not how the body of water was formed, whether by a cut off or earthquake, but whether or not the water gradually withdrew from the land of the riparian owners.

A significant case is that of Naylor v. Cox (Mo.) 21 S. W., 589, the head note which we quote. (Quotation therefrom).

The Supreme Court of Arkansas has passed upon this very question with regard to "Old River" channels. A leading case is Nix v. Pfeifer, 83 S. W., 951, 73 Ark., 199. This was a case where the situation was very similar to the case at bar. It involved a cut off of the Arkansas River. (Quotation therefrom).

It clearly appears from this case that the court discussed a case where the body of water was formed by a cut off, as involving the application of the doctrine of reliction.

The true test as above stated is not how the body of water is created, but whether the recission of the water is gradual and imperceptible.

To the same effect is Barboro v. Boyle, 178 S. W., 378, (Supreme Court of Arkansas, June 21, 1915) as showing the situation of locus in quo, we excerpt from the opinion: (Quotation therefrom).

The above excerpt shows that this lake was very similar to the one involved in the case at bar, and was formed by a change in the channel of the river and, and yet the court treats as a determining test in regard to the ownership of the land under the lake—not the question of whether the lake was formed by an avulsion, but the question of whether or not it was navigable.

If the doctrine contended for by the plaintiffs be correct, the question of navigability or unnavigability of the lake involved in Barboro v. Boyle would have been immaterial, because having once been the bed of a navigable river, which left this bed as the result of an avulsion, the right of the state to the bed became unalterably fixed. As was said long ago by Ulpian: (Quotation therefrom).

We submit that any other doctrine in regard to a stream subject to such vagaries as the Mississippi River would result in the enlargement of the public dominion by infringing upon the rights of the riparian owners. If the river changed its course three times, the state would own three abandoned beds, and also the bed being

used by the river. Such a result should not be looked upon by the courts with favor.

It is, therefore, insisted that the evidence in this case, without dispute, shows a title to the land, from which the timber was cut, in the defendant, because of the fact that the water first receded from defendant's land, and the result of this reliction, under decisions in Arkansas was that this gave to the defendants the title to the land from which the water receded. This being true, the defendant was in all events entitled to a directed verdict, because the plaintiff cut timber from the land, the title to which was in the defendants. Plaintiffs had no adverse possession of the land. Therefore, the constructive possession of the land and timber was in the true owner, the defendant,and no one could maintain replevin against defendant for timber cut from the land.

EFFECT OF THE DECISION OF THE SUPREME COURT OF THE UNITED STATES UPON THE DECISION OF THIS CASE.

Under two aspects of this case the determination of the boundary line between the State of Arkansas and the State of Mississippi is vital. If defendant is right in its contention that plaintiffs cannot recover unless they show title in themselves to the land from which the timber was cut, then a determination that the land is in Arkansas is fatal to the plaintiff's case. Or, if the defendant is right in its contention that the land being in Arkansas, the title is in it, then a decision that the land is in Arkansas necessarily determines this case in favor of defendant.

For this reason, we again respectfully submit that the better course to pursue would be to allow the decision of this case to await the determination of this boundary by the Supreme Court of the United States in the case of

Arkansas v. Mississippi, which will probably finally be heard by the Supreme Court not later than January 1, 1916. It would certainly be an anomalous situation for this court to hold a certain tract of land to be in Arkansas, or Mississippi, and determine the rights to the parties upon that basis, and then have the Supreme Court of the United States, the only tribunal with jurisdiction authoritatively to fix the boundary between the two states, to hold that the land was in the other state.

CONCLUSION.

In conclusion, we earnestly insist that this case be reversed for the following reasons:

(1). The Court instructed the jury that the plaintiffs were entitled to recover unless the defendant proved to the satisfaction of the jury that it owned the land. Whereas, the true rule is that the plaintiffs not having been in adverse possession of the land when the timber was cut, could only recover the timber, and maintain their action of replevin by themselves assuming the burden of showing ownership of the land.

(2). The court instructed the jury that the defendant could not defeat the action unless it showed itself to be the owner of the land. Whereas, the undoubted rule is that a defendant may defeat an action of replevin for timber severed from the realty by showing adverse possesison of the realty in itself at the time of the severance.

It is further insisted that the defendant was entitled to a directed verdict, and that this Court should now dismiss the case for the following reasons:

(1). Because the undisputed evidence shows that neither plaintiffs, nor their vendors had any possession

of, or title to the realty from which the timber was cut, and the burden of proof being upon them to show such possession, or title, they must fail in this action.

(2). Because the undisputed evidence shows that the true title to the land from which the timber was cut was in defendant, and that plantiffs did not have adverse possession of the land, and, therefore, could nct maintain an action of replevin for timber cut from it.

Respectfully submitted,

WILSON & ARMSTRONG,
MONTGOMERY & MONTGOMERY,
Attorneys for Defendant,
Rust Land & Lumber Company.

I, W. P. Armstrong, one of the attorneys for the appellant (defendant), Rust Land & Lumber Company, hereby certify that I have this day mailed, postage prepaid, to Greene & Greene, Jackson, Mississippi, Attorneys for appellees, (plaintiffs) a true copy of the foregoing statement of the case, brief and argument, dated at Memphis this 26th day of September, 1916.

W. P. ARMSTRONG,
Attorney for Appellant,
Rust Land & Lumber Company.